

NO. 01-21-00627-CV

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS AT HOUSTON

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
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CHRISTOPHER A. PRINE
Clerk

Michael W. Gioffredi,
Appellants,
v.
The Retreat at Riverstone,
Appellee.

On Appeal from the County Court at Law No. 1
Fort Bend County, Texas
Tr. Ct. No. 21-CCV-068826

APPELLEE'S RESPONSE TO APPELLANT'S REQUEST FOR
SUPPLEMENTAL REPORTER'S RECORD OR NEW TRIAL

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RIVERSTONE**

TO THE HONORABLE FIRST COURT OF APPEALS:

The “Court of Appeals has broad authority to supplement the record on its own motion if anything relevant is omitted from the reporter’s record, and unless supplementation will unreasonably delay disposition of the appeal, supplementation should be allowed” *GMR Gymnastics Sales, Inc., v. Walz*, 117 S.W.3d 57 (Tex. App. 2003).

However, a record cannot be supplemented with documents that were not admitted into evidence and not on file when the trial court rendered judgment. *In re E.W.*, No. 05-10-01463-CV, 2002 WL 1265541 (Tex. App. June 7, 2002). A trial record cannot be properly characterized as incomplete because it does not include documents that were not presented to the trial court or because it does not include documents that were not admitted into evidence. *Hernandez Gonzalez v. Quaterman*, No. CIVA SA-06-CA-0354 N, 2006 WL 3098776, at*12 (W.D. Tex. Oct. 30, 2006).

Appellant in a *pro se* capacity filed a request for a Supplemental Reporter’s Record or New Trial, in which Appellant states “I request under Tex. R. App. P. 34.6(d) that the appellate court direct the court reporter to prepare, certify, and file in the appellate court a supplemental reporter’s record containing this omitted item.” Appellant goes on to state in his request “[t]he court reporter has stated that “Exhibit 116 was never offered or admitted into evidence; therefore it was never in my possession.”” Appellant cites Texas Rule of Appellate Procedure 34(f); however, no

such rule exists. However, given the context of Appellant's arguments and the fact he is a *pro se* litigant, we will assume he is referencing Tex. R. App. P. 34.6(f) as it deals with when an appellant might be entitled to a new trial under specific circumstances which are listed below.

- 1) if the appellant has timely requested a reporter's record;
- 2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or--if the proceedings were electronically recorded--a significant portion of the recording has been lost or destroyed or is inaudible;
- 3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and
- 4) if the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.

Tex. R. App. P. 34.6(f) It is important to notate the difference, Rule 34.6(f) applies where the reporters record is lost or destroyed.

This is simply not the case here, Appellant in his request cites the court reporter as having stated "Exhibit was never offered or admitted into evidence therefore, it was never in my possession" as well as the information sheet by court reporters filled in this court on March 1, 2022 which states in the section labeled additional comments "Plaintiff's Exhibits were never formally offered nor admitted into evidence." Therefore, having never been offered or admitted

into evidence such documents are not entitled to be supplemented into the Reporters record. A record cannot be supplemented with documents that were not admitted into evidence and not on file when the trial court rendered judgment. *In re E.W.*, No. 05-10-01463-CV, 2002 WL 1265541 (Tex. App. June 7, 2002).

Dated: March 11, 2022

Respectfully submitted,

/s/ Sarbjit Nagi
Sarbjit Nagi, Of Counsel
Texas Bar No.: 24125337

Certificate of Service

As required by Texas Rule of Appellate Procedure 6.3 and 9.5(b), (d), (e), I certify that I have served this document on all other parties which are listed below on this 11th day of March 2022.

Appellant: Michael W. Gioffredi

Method of delivery: electronic transmission

/s/ Sarbjit Nagi
Sarbjit Nagi, Of Counsel

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